No. 02-370

Supreme Court U.S.
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In The

Supreme Court of the United States

ANCHOR HOCKING, INC.,

Petitioner,

v.

ARLEEN E. WADDILL,

Respondent.

On Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Oregon's process of appellate review of the size of a punitive damage award comport with the Due Process Clause?

LIST OF PARTIES

The case caption includes the names of all parties. Respondent Arleen E. Waddill is an individual. Petitioner Anchor Hocking, Inc. is a subsidiary of Newell Rubbermaid Inc., which is a publicly traded company.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition for writ of certiorari should be denied. Oregon's process of appellate review of punitive damages awards in civil cases is constitutionally sound. It complies with the constitutional requirements for review of jury determinations in *criminal* cases and it incorporates the constitutional standards of *BMW of North America, Inc. v. Gore,* 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996) without deference to the lower court's decision.

OPINIONS BELOW

The trial court's decisions are unreported. The opinion of the Oregon Court of Appeals is reported at 175 Or App 294, 27 P3d 1092 (2001) and is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari. The decision of the Oregon Supreme Court denying review is reported at 334 Or 260, 47 P3d 486 (2002).

STATEMENT OF THE CASE

Defendant understandably avoids any recitation of the evidence in support of the punitive damages award, as it amply supports the jury's verdict. *See* Pet. App. A, 9a-18a. Instead Anchor Hocking drops references to plaintiff's "cut hand," and the so-called "facts" underlying the prior claims which proved Anchor Hocking's notice of the hazard presented by its fishbowl.

Much of the evidence Anchor Hocking now relies on in mitigation of the prior complaints of injury was not submitted at trial, was not part of the record before the jury,

and thus cannot now be considered. The statements Anchor Hocking makes in its Petition at 3 regarding the disposition of the Bye and Gifford claims were not submitted until *after* the trial on a post-verdict motion to set aside or remit the punitive damages verdict. They form no part of the legitimate record on appeal and must be disregarded.

Anchor Hocking also claims an "absence of evidence that it 'concealed' records of its 'guilt.'" Petition at 6. In fact, Anchor Hocking stipulated to an instruction that told the jury that when asked to produce prior complaints of injury it did not do so.

Ms. Waddill suffered considerably more than a "cut hand." Anchor Hocking's fishbowl shattered explosively while she was carrying it, full of water and cradled in both hands, after cleaning it. Tr. 110. Shards of glass slashed her ulnar artery, lacerated her ulnar nerve, and severed a tendon in her left wrist; she also had a partial laceration to her right index finger and the nerve and artery on its side. Tr. 120-21.

Mrs. Waddill was taken to the hospital by ambulance, where she underwent a three-hour repair surgery. Tr. 123, 156. She had to rely on medication for control of her pain for more than a month, during which time she was dependent on the assistance of other family members for all personal care. Tr. 134, 139. The ulnar nerve damage resulted in wasting of the muscle in her hand; as a result, when she is fatigued she lacks the muscle power to extend her fingers, and they involuntarily form a claw. Tr. 124. She has difficulty moving her fingers in order to do simple hand movements, and has reduced sensitivity to touch; as a result she has difficulty doing anything that requires fine finger manipulation. Tr. 124-5, 164. The injury has

reduced her ability to use a typewriter keyboard as she has in the past; she will not have her former efficiency when she returns to her job selling insurance, as she planned to do when her children were older. Tr. 126, 108. Her physician testified that these sequelae are permanent. Tr. 124-6. She has abnormal sensitivities to heat and cold, which were still disturbing her at the time of trial, and which may persist for years and may also be permanent. Tr. 127-8, 136. She has permanent scars. Tr. 112.

The jury awarded plaintiff $134,472.00 in compensatory damages.

The evidence amply supports the punitive damage award. The jury learned that for almost 15 years prior to trial, Anchor Hocking failed to take any measures to protect consumers from a known, serious risk. Despite receiving notice of injuries, defendant never explored its responsibility to warn the public of the product's latent danger – that even a small crack or scratch (or, in the parlance of a materials scientist, a "singularity" or "defect"), in the normal course of use, could cause a fishbowl full of water to shatter simply from water pressure. Tr. 215-16. The information that would have alerted defendant to the need for warnings was its history of past injury claims – history to which defendant made no response and which it routinely discarded. Tr. 303. Although conceding that prior claims history was pivotal to determining the propriety of a warning (Tr. 304), upon learning of fishbowl injuries similar to plaintiff's, defendant ignored the danger and eventually destroyed the records that demonstrated it.

Anchor Hocking's record destruction policy was one manifestation, among many, of its conscious disregard for

the likelihood of personal injuries. Anchor Hocking's product engineering manager had never heard of a personal injury associated with the use of a fishbowl – despite the three prior claims against Anchor Hocking. Tr. 317. He "didn't know" whether Anchor Hocking's document retention policy would be changed as a result of her claim, and agreed that in five years Anchor Hocking's corporate memory would again be cleansed of prior claims. Tr. 477.

The jury learned that prior injuries had not prompted defendant to reconsider the safety of its fishbowls, to inform itself of consumers' normal uses of the product that might exacerbate the danger, or to warn of potential risks. They learned that this lawsuit, just like the others, would likely become a discarded corporate record with the same result: no change that would protect the next consumer from injury by a latent hazard. Tr. 477.

The Court of Appeals upheld the punitive damage award of $1 million under state law and the federal constitution. The Court reviewed the award without deference to the trial court's decision to uphold it. Pet. App. A at 11a, n. 5. It applied the constitutional standards of *BMW v. Gore*. *Id.*, at 15a-17a. It was persuaded that the award was lawful because, among other reasons, plaintiff's injuries were serious and her damages were substantial, defendant consciously ignored indications that its product was unsafe, and, even after reduction for plaintiff's fault, the ratio was less than 10:1 between punitive and compensatory damages, not a disproportionate punishment. The court concluded that the verdict was within the range that a reasonable juror could award. Pet. App. A at 17a.

PRESERVATION OF ERROR

Anchor Hocking relied on the "rational juror" standard of review in the trial court and failed to suggest any other template for review to meet due process requirements. In the Court of Appeals it accepted the rational juror standard without reservation in conjunction with the constitutional guideposts of *BMW v. Gore*. Similarly, it never suggested to the Oregon appellate courts that appellate review of the trial court's decision to uphold the jury's verdict was deficient under the Due Process Clause. It was not until this Court's decision in *Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 US 424, 121 S Ct 1678, 149 L Ed 2d 674 (2001) – after the case had been decided in the Court of Appeals, reversed in the Supreme Court and remanded to the Court of Appeals for further adjudication – that defendant suggested anything different. The Court of Appeals on remand rejected Anchor Hocking's request to submit briefing on *Cooper*. Nonetheless, the court addressed *Cooper's* requirement for "de novo" review, held that it meant review as a matter of law without deference to the trial court's judgment, and reviewed the punitive damage amount accordingly. Pet. App. A, 11a.

With regard to extraterritoriality – the single hook on which Anchor Hocking seeks to hang its request to hold this petition pending disposition of *State Farm Mut. Auto Ins. Co. v. Campbell,* No. 01-1289 (certiorari granted June 3, 2002) – there is no properly preserved claim of error. Anchor Hocking never moved at trial to exclude the evidence of prior injuries on the basis of "extraterritorial" punishment. The prior injury complaints were properly admitted because they were substantially similar to this accident and proved Anchor Hocking's notice of a recurring

danger with its fishbowls; defendant never sought a limiting instruction. In addition, Anchor Hocking never sought at trial to exclude evidence of its net worth, or to restrict the evidence to its profits in Oregon on constitutional grounds. On post-verdict and post-judgment motions in the trial court Anchor Hocking did not assert that consideration of its net worth without reduction to profits derived in Oregon was an improper extraterritorial basis for the punitive damage award.

REASONS FOR DENYING THE WRIT

In Oregon both the trial court and the appellate courts review the jury's verdict in the same way: measuring whether, in light of state law standards and the substantive constitutional limitations imposed in *Gore,* a rational juror could reach the amount awarded. The problem *Cooper* addressed – the federal appellate court's deferential review of the trial court's excessiveness determination – does not exist in Oregon. An Oregon appellate court reviews the trial judge's legal determination of the lawfulness of the verdict for error of law; this means anew and without deference.

The "rational juror" standard comports with the requirements of the Due Process Clause in criminal convictions, including a jury's decision to impose the death penalty. It is consistent with the common law tradition of excessiveness review of damage awards – to ensure that the amount is reasonable.

This case involves serious, permanent personal injuries. The jury's award of significant compensatory

damages, coupled with Anchor Hocking's conscious indifference to the risk of this and future injuries, justified a correspondingly significant punitive damage award.

ARGUMENT

I.

OREGON DOES NOT HAVE A DEFERENTIAL REVIEW PROCESS FOR TRIAL COURT DETERMINATIONS OF EXCESSIVENESS.

From statehood until 1910 Oregon trial courts conducted a common law weight of the evidence review of jury verdicts challenged as excessive. Oregon trial courts were authorized to "weigh and consider all the evidence which has been submitted to the jury" and to set aside a verdict and grant a new trial if the trial court believed "that the verdict is against the clear weight [of the evidence], or is one that is manifestly unjust, or that reasonable men would not adopt or return[.]" *Serles v. Serles,* 35 Or 289, 293, 57 P 634 (1899).

The common law constrained the scope of appellate review of a trial judge's weight of the evidence decision. It was well settled in Oregon that a trial court's refusal to set aside a jury verdict as excessive could not be reviewed on appeal "because [that decision] does not present a question of law, but one of fact[.]" *Lindsay v. Grande Ronde Lumber Co.,* 48 Or 430, 438, 87 P 145 (1906); *Nelson v. Oregon R. & N. Co.,* 13 Or 141, 143, 9 P. 321 (1886) ("Nothing but questions of law appearing upon the transcript can be reviewed here.").

In 1910 Oregonians amended Article VII of the Oregon Constitution by initiative to limit the power of judges to set aside the factual determinations of juries. Section 3 of Amended Article VII provides in relevant part:

> In actions at law, where the value in controversy shall exceed $ 750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

This amendment was directed primarily to trial judges; it eliminated the common law remittitur powers that trial judges had freely exercised. *Van Lom v. Schneiderman,* 187 Or 89, 99, 210 P2d 461 (1949), *overruled in part Honda Motor Co. v. Oberg,* 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994) (the purpose of the amendment was "to eliminate, as an incident of jury trial in this state, the common law power of a trial court to reexamine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence.").

In *Honda Motor Co. v. Oberg*, this Court held that Oregon's constitutional limitation on the courts' reexamination of facts found by juries was inconsistent with the Due Process Clause of the Fourteenth Amendment as applied to the jury's determination of the amount of a punitive damage award. 512 US at 418, 432. This Court reviewed the near-universal common law tradition of judicial review of the size of damages awards and held that Oregon courts likewise must review the size of punitive damages awards. This was required in order to ensure that "those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of

arbitrary amounts," and to ensure that the verdict is based on "evidence providing at least a *rational basis* for the particular deprivation of property imposed by the State to deter future wrongdoing." 512 US at 429. (Emphasis added).

The court did not decide "what standard of review is constitutionally required" but indicated that the formulations of state common law remittitur courts may be "rough equivalents" of the "rational trier of fact" standard of *Jackson v. Virginia,* 443 US 307, 324, 99 S Ct 2781, 61 L Ed 2d 560 (1979). 512 US at 432, n. 10.

On remand the Oregon Supreme Court applied the mandates of the Due Process Clause and reviewed the size of the punitive damage award as required. *Oberg v. Honda Motor Co.,* 320 Or 544, 549, 888 P2d 8 (1995), *cert den,* 517 US 1219 (1996). The court announced and applied a review process that incorporated the rational juror standard of *Jackson v. Virginia*:

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.[1]

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[1] The Oregon judicial review process is now codified in ORS 18.537, which provides, in relevant part:

> (2) If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational

(Continued on following page)

In *Pacific Mut. Life Ins. Co. v. Haslip,* 499 US 1, 111 S Ct 1032, 113 L Ed 2d 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.,* 509 US 443, 113 S Ct 2711, 125 L Ed 2d 366 (1993) this Court held that the Fourteenth Amendment imposes both procedural and substantive constraints on punitive damages awards. It imposes procedural safeguards such as the requirement for adequate jury instructions and post-verdict judicial review. *Haslip,* 499 US at 23. *Haslip* noted that the constitutional purpose of judicial review was to "make[ ] certain that the punitive damages are "*reasonable* in their amount and *rational* in light of their purpose to punish what has occurred and to deter its repetition." 499 US at 21. (Emphases added). The Due Process Clause also sets substantive limits "beyond which penalties may not go." *TXO,* 509 US at 453-54 (internal quotations omitted).

In *BMW v. Gore,* the court announced substantive constitutional standards in the form of "guideposts." Those guideposts were intended to ensure that the principles of the Due Process Clause are met, namely to prohibit arbitrary awards that are excessive in light of the state's interests that punitive damages are designed to serve, and to provide notice of sanctionable conduct and the severity of punishment that may be imposed. *Gore,* 517 US at 574. A reviewing court must examine (1) the degree of

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> juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

The statute was enacted in 1995 and became effective in September 1996. Both this case and *Parrott v. Carr Chevrolet, Inc.,* 331 Or 537, 17 P3d 473 (2001) arose before the statute went into effect.

reprehensibility of the defendant's conduct; (2) the disparity between the punitive damages award and the actual or potential harm inflicted; and (3) the civil and criminal sanctions provided for comparable misconduct. 517 US at 574-585.

In *Parrott v. Carr Chevrolet,* 331 Or 537, 17 P3d 473 (2001) the court addressed the appropriate standard for post-verdict judicial review of a punitive damages award in Oregon in light of *BMW v. Gore.* The court rejected defendant's contention that *Gore* "superseded" the rational juror standard of review. 331 Or at 554. The court stated that *Gore* did not change the existing constitutional standard – gross excessiveness. Rather, *Gore* emphasized that only a "grossly excessive" award enters the "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 331 Or at 554, *quoting Gore,* 517 US at 568. Nor did *Gore* exclude judicial consideration of other factors that might be relevant in assessing whether a punitive damages award is excessive. 331 Or at 553. The court continued:

> [W]e conclude that the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the *Oberg* (state) rational juror review. 331 Or at 554.

The court then announced the following review standard:

> Combining the factors announced by the Supreme Court in *Gore* with those announced by this court in *Oberg* (state), the range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue, *Oberg*

> (state), 320 Or at 549; (2) the state interests that a punitive damages award is designed to serve, *Gore,* 517 US at 568; (3) the degree of reprehensibility of the defendant's conduct, *Gore,* 517 US at 575; (4) the disparity between the punitive damages award and the actual or potential harm inflicted, *Gore,* 517 US at 580; and (5) the civil and criminal sanctions provided for comparable misconduct, *Gore,* 517 US at 583, 331 Or at 555. (Emphasis added).

The court then addressed the constitutionally sensitive area of judicial review of facts found by the jury:

> Although application of the gross excessiveness standard is a question of law, we recognize that, as part of that application, the reviewing court must "re-examine" the facts in the record – a requirement that is contrary to Oregon law. 331 Or at 555.

But, as the court recognized, that conflict had already been addressed in *Oberg* on remand: "Under the Supremacy Clause, we are bound to follow the requirements of federal due process in the face of that conflict." 331 Or at 556, *quoting Oberg* (on remand), 320 Or at 548-49.

Parrott continued with the uncontroversial statement that the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them. The court stated:

> In other words, the reviewing court must resolve all disputes regarding facts and factual inferences in favor of the jury's verdict and then determine, on the facts as the jury was entitled to find them, whether the award violates the legal

> standard of gross excessiveness. 331 Or at 556-557.

This, the court concluded, was consistent with *Gore,* 517 US at 579-80 (accepting jury's finding that BMW suppressed material fact that it was obligated to communicate to customers under Alabama law, but determining that BMW's omission was not sufficiently reprehensible to justify $2 million punitive damages award) and *Haslip,* 499 US at 13 (no reason to question jury finding when it is supported by record). As discussed *infra,* it is also consistent with *Cooper,* 532 US at 440, n. 14, and other recent opinions on which *Cooper* relied requiring "de novo" rather than deferential review of constitutionally sensitive, fact-bound rulings in the trial court. *United States v. Bajakajian,* 524 US 321, 336-337, n. 10, 118 S Ct 2028, 141 L Ed 2d 314 (1998); *Ornelas v. United States,* 517 US 690, 697, 699, 116 S Ct 1657, 134 L Ed 2d 911 (1996).

II.

OREGON APPELLATE REVIEW FOR ERROR OF LAW COMPORTS WITH DUE PROCESS.

Anchor Hocking vilifies the Oregon courts for repeatedly "def[ying]" this Court's requirement for judicial review of punitive damage awards. Petition at 6, 9. It describes *Oberg* (on remand) and *Parrott* as "forbid[ding] independent judicial scrutiny," as providing review "in form but not in substance" and as requiring "complete deference to the jury unless the verdict was completely irrational." Petition at 7.

Even a cursory review of the *Parrott* decision belies Anchor Hocking's histrionics. There, the Supreme Court gave no deference to the trial judge's rationale for reducing

the verdict of $1 million to $50,000. The court engaged in a thorough review of the evidentiary record applying first the common law and then the constitutional factors set forth in *Gore*. 331 Or at 559-66. Similarly here, the Court of Appeals gave no deference to the trial court's decision upholding the punitive damage award. It undertook its own assessment of the evidence for compliance with the statutory and constitutional standards. Pet. App. A at 11a-17a.[2]

Anchor Hocking argues a point that plaintiff does not controvert: that the *BMW* guideposts call for "legal conclusions," "legal inquiries," and the exercise of an "inherently legal function." Pet. Cert. at 14-15. Anchor Hocking's assertion that the Oregon courts refuse to engage in this process – and, in particular, its invocation of *Cooper* – simply reflects its ignorance of the Oregon review procedure.

Like certain litigants before the Court in *Cooper*, Anchor Hocking merges the concepts of the proper standard for reviewing the District Court's due process determination – the issue addressed in *Cooper* – with the question of the substantive standard for determining the verdict's conformity with due process in the first instance. 532 US at 432, n. 4. As addressed in Section A below, Oregon courts review the trial court's due process determination without deference. The Oregon courts identify the latter as the "rational juror" standard. As addressed in

[2] This should be compared with the Ninth Circuit's cursory review of the award in *Leatherman Tool Group, Inc. v. Cooper Indus. Inc.*, 205 F3d 1351 (9th Cir 1999), *rev'd*, 532 US 424 (2001). Without any mention of *Gore*, the court simply stated that the trial court's evidentiary findings in support of due process were supported by evidence and it did not abuse its discretion in refusing to reduce the award.

Section B below, a review standard that measures the rationality of a jury's award in terms of the *Gore* standards fully comports with due process.

A. Oregon appellate courts review excessive verdict claims for error of law without deference to the trial court.

In contrast to review of a jury's factual determinations, Oregon courts have never been restricted by common law or constitution in the manner in which they conduct review for errors of law. When an appellate court reviews a trial judge's legal determinations, it does so "anew," and "without deference to the decisions of trial courts." *State v. Rogers,* 330 Or 282, 312 n. 8, 4 P3d 1261 (2000). In *Rogers* the court explained its process and terminology as follows:

> To say that a trial court necessarily abuses its discretion if it applies the wrong principle of law or incorrectly applies the correct rule of law leads to the same result. However, the formulation that we have set out is more straightforward and correctly distinguishes that we do not defer to trial courts' legal determinations. To say that an appellate court should review the legal aspects of an evidentiary ruling for abuse of discretion and that a trial court abuses its discretion if it makes a legal error unnecessarily complicates a simple principle, *i.e.,* that appellate courts review questions of law anew without deference to the decisions of trial courts. 330 Or at 312 n. 8. (Emphasis added).

Unlike a trial court's discretionary ruling, in which the trial judge has authority "to choose among several legally correct outcomes" any of which may be affirmed if

supported by the record, an issue of law "can yield only one correct answer." *State v. Rogers,* 330 Or at 311-312; *State v. Titus,* 328 Or 475, 481, 982 P2d 1133 (1999). A trial court "has no discretion" to reach a legally erroneous conclusion. *State v. Rogers,* 330 Or at 312 *quoting State v. Titus*, 328 Or at 481. There is no deference given to the trial court's interpretation of the law. *Id.*

The trial court's review of the size of a punitive damage award is a legal ruling that the Oregon appellate courts review "anew" and without deference. It was for this reason that in its decision on remand in *Oberg* the Oregon Supreme Court chose to review the size of the punitive damages award itself rather then send the case back to the trial court. As the court stated, the Oregon Supreme Court was

> in as good a position as would be the trial court to apply a legal standard to the evidence in the record. *Oberg* (on remand), 320 Or at 552.

The court also recognized the value of appellate decisions in the development of unified precedent, an issue of concern in this Court's recent discussions of the standard of appellate review. *Ornelas,* 517 US at 697; *Cooper,* 532 US at 436. The Oregon court stated that

> by applying the new standard to the facts in this case, we may be able to give some guidance to trial courts that will need to follow this standard in the future. *Id.*

Clearly, the Oregon Supreme Court has not shirked its responsibility to give "meaningful content through case-by-case application at the appellate level" to punitive damage review. *Cooper,* 532 US at 436.

In a punitive damages case the trial court's legal determinations which are subject to non-deferential review for error of law include the sufficiency of the evidence to support punitive liability, the adequacy and accuracy of jury instructions, and – since this Court's decision in *Honda Motor Co. v. Oberg*, *supra* – evaluation of a jury's award of punitive damages for compliance with the substantive due process standards that prevent an unconstitutionally excessive verdict. Thus, this court's decision in *Cooper* requires nothing that Oregon does not already provide litigants seeking review of punitive damages verdicts.

In *Cooper*, this Court addressed the standard of appellate review by which a federal appellate court is to review a federal district court's decision regarding the constitutionality of a jury's punitive damage award. Historically, the Seventh Amendment of the U.S. Constitution forbad a federal appeals court from reviewing a trial judge's refusal to set aside a jury award of compensatory damages on the ground that they were excessive. This Court modified that rule several years before *Cooper* to allow federal appellate courts to review district court determinations for abuse of discretion, at least in diversity cases when the substantive state law provided for that kind of appellate review. *Gasperini v. Center for Humanities, Inc.*, 518 US 415, 116 S Ct 2211, 135 L Ed 2d 659 (1996).

In *Cooper*, the court imposed a "de novo" standard of review in a punitive damages case, rather than the more deferential abuse of discretion standard of review advocated by the plaintiff. It did so on the strength of criminal law decisions that, like punitive damage review, also required the application of a constitutional standard to the

facts of a particular case. 532 US at 435-436. *Ornelas* (the determination of reasonable suspicion and probable cause); *Bajakajian* (the constitutional proportionality of a criminal fine).

Cooper and the cases on which it relies make clear that "de novo" review is the same thing as Oregon's review for error of law. It is not a process of reweighing the evidence:

> [N]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings [relevant to the considerations on which the jury was instructed in awarding an amount of punitive damages]. 532 US at 439-440, n. 12.

To the contrary, *Cooper* reaffirms the jury's role as primary fact-finder in a "fact-sensitive undertaking" which appropriately relies on jury discretion. 532 US at 437-38, n. 11. *Ornelas* directs that the factual findings as well as the inferences drawn from them by the trial court cannot be disturbed unless clearly erroneous. *Ornelas,* 517 US at 699; *see also Bajakajian,* 524 US at 336-337, n. 10.

The "de novo" review contemplated in *Cooper* means non-deferential review of the trial court's determination about the lawfulness of the punitive damages award. *Ornelas,* 517 US at 697 ("We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's

determination."). This is the kind of review Oregon appellate courts conduct in addressing a challenge to the size of a punitive damage award.

B. The rational juror standard, identified by this Court and adopted in Oregon in *Oberg*, comports with due process.

Parrott makes "the range that a rational juror would be entitled to award" "depend[ent] on" state law and substantive constitutional standards. 331 Or at 555. This adaptation of the rational juror standard fully comports with due process. In *Jackson v. Virginia,* this Court held that the Fourteenth Amendment required a reviewing federal habeas corpus court to discern whether any rational trier of fact could have convicted based on the evidence.

The Oregon Supreme Court has interpreted the "rational juror" standard of review as more stringent than the "no evidence" standard set forth in Article VII (Amended), section 3, of the Oregon Constitution. *State v. Harris,* 288 Or 703, 721, 609 P2d 798 (1980). Oregon must apply it in criminal cases as a matter of federal constitutional law. *Id.* ("In criminal cases * * * this court is bound to conform to requirements imposed by the Constitution of the United States as interpreted by the Supreme Court of the United States." 288 Or at 721.).

The "rational juror" standard applies to a jury's decision to impose the death penalty, as well as to criminal convictions. *State v. Moore,* 324 Or 396, 431, 927 P2d 1073 (1996). In *Moore*, the court held that it provides meaningful review of decisions in which the jury exercises discretion in invoking the death penalty. The court applied the

rational juror standard to review of an additional statutory jury question unlike others involving more traditional evidentiary review – "whether the defendant should receive a death sentence." 324 Or at 430. The court acknowledged that the question framed a "discretionary determination" without a burden of proof requirement like the other questions. 324 Or at 432, 433. Nonetheless, the court held, review under a rational juror standard was appropriate because the jury's decision "still must be based upon the evidence presented at trial." 324 Or at 433.

So here. Constitutional excessiveness review, framed in terms of the rational juror standard, comports with this Court's constitutional jurisprudence.

Anchor Hocking criticizes the rational juror standard as too deferential to the jury. Yet it is entirely consistent with the traditional common law approach by which remittitur courts review the amount of the award:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that is it reasonable. *Haslip,* 499 US at 15. (Emphasis added).

This Court continued to emphasize the primary role of the jury as fact-finder in punitive damages cases in *Cooper,* 532 US at 440, n. 14. In *Ornelas,* 517 US at 699, the Court explained that on *de novo* review of determinations of reasonable suspicion and probable cause, the reviewing court should nonetheless "take care both to review findings of historical fact only for clear error and to give due

weight to inferences drawn from those facts by resident judges and local law enforcement officers." *See also Bajakajian,* 524 US at 336-337.

This corresponds with the rational juror standard as it is applied in criminal cases. In *Herrera v. Collins,* 506 US 390, 113 S Ct 853, 122 L Ed 2d 203 (1993), this Court stated:

> [T]he *Jackson* inquiry does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit. 506 US at 402. (Emphasis in original).

In *Anderson v. Fuller,* 455 US 1028, 102 S Ct 1734, 72 L Ed 2d 150 (1982), dissenters from the denial of *certiorari* criticized the federal judges below on habeas review who set aside a conviction under the *Jackson v. Virginia* review standard: they "acted like jurors, not jurists." 455 US at 1033.

Oregon's review of punitive damage awards for constitutional excessiveness under a rational juror standard comports with the Due Process Clause. Under that standard Oregon provides the kind of non-deferential appellate review for legal error which this Court has required in *Cooper, Bajakajian* and *Ornelas.* While Oregon courts do not call it "de novo,"[3] review for error of law

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[3] In *Trabosh v. Washington County,* 140 Or App 159, 915 P2d 1011 (1996), the court addressed the differences between federal and state terminology for review standards:

> We do not, as plaintiff states, review questions of law "de novo." That term derives from appellate review of equity cases and refers solely to the court's ability to make its own

(Continued on following page)

means an independent, non-deferential, look at the challenged legal ruling of the trial court. This is what the Due Process Clause requires; this is what Anchor Hocking got.

III.

THE EXCESSIVE FINES CLAUSE DOES NOT APPLY IN THIS CIVIL CASE.

In *Bajakajian*, this Court eliminated from the scope of the Excessive Fines Clause all but those monetary punishments that are directly connected with the prosecution of crime. The Court made reference to *Austin v. U.S.*, 509 US 602, 113 S Ct 2801, 125 L Ed 2d 488 (1993), which held that *in rem* forfeiture of property as punishment for violation of drug laws was subject to the Eighth Amendment limitation on excessive fines. 524 US at 331, n. 6. At the same time it distinguished civil *in rem* proceedings in which the instrumentality of crime could be forfeited without implicating the Excessive Fines Clause. 524 US at 333-334 and n. 8. Anchor Hocking has not been subjected to any criminal proceeding. The state is not a party to this civil proceeding. The jury is not even permitted to be told that the state is entitled to a share for the punitive damages award. *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 797 P2d 1019 (1990).

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determination of the facts when it has the authority to "try the cause anew upon the record." See ORS 19.125(3). 140 Or App at 164, n. 6. (Emphasis in original).

The court explained that federal courts use the phrase "de novo" to describe review of issues of law as well as of fact, but in Oregon "it applies only to issues of fact." *Id.*

This Court's analysis in *Browning-Ferris v. Kelco Disposal,* 492 US 257, 109 S Ct 2909, 106 L Ed 2d 219 (1980) clearly indicates that the Excessive Fines Clause has no application to private litigation where the government takes no prosecutorial role. 492 US at 275-6 and n. 21. The Court reasoned:

> [T]he history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines *directly imposed by*, and payable to, the government. 492 US at 268. (Emphasis added).

This punitive damage award neither follows from nor arises out of a criminal process. In *Austin*, this Court held that the Eighth Amendment limits the amount the federal government may recover in a civil action, after the defendant already has been punished through the criminal process. There, the defendant faced seven years of imprisonment in addition to property forfeiture. In *Alexander v. U.S.,* 509 US 544, 113 S Ct 2766, 125 L Ed 2d 441 (1993) this Court held that *in personam* forfeiture of property as punishment for criminal racketeering was subject to the Eighth Amendment. There, the defendant faced six years of imprisonment, $100,000 fine, reimbursement for costs of prosecution, supervision in addition to property forfeiture. In *Bajakajian*, defendant was prosecuted by the federal government for a criminal law violation; he was sentenced to a term of probation and fined, in addition to facing forfeiture of the currency he was unlawfully transporting. Imposition of punitive damages in a civil proceeding is entirely different from the forfeitures imposed in these criminal prosecutions. The Excessive Fines Clause does not apply to a punitive damage award.

IV.

THERE IS NO ISSUE PROPERLY BEFORE THIS COURT THAT IMPLICATES "EXTRATERRITORIALITY" CONCERNS.

Even if this Court were to disregard its customary requirement for proper preservation of error, Anchor Hocking presents no colorable issue of extraterritorial punishment.

One of the prior injuries occurred in Tennessee. The other two took place in Oregon. The jury was never asked to increase or multiply the amount of punitive damages to punish for any of these prior occurrences. The mere fact of another injury from another state does not establish unlawful, extraterritorial punishment. *TXO* rejected the contention that evidence of wrongdoing in other parts of the country and of the corporate defendant's net worth were impermissible: "Under well-settled law * * * factors such as these are typically considered in assessing punitive damages." 509 US at 462, n. 28. *Gore* expressly noted that evidence of similar occurrences in other states is relevant to show the wanton character of defendant's conduct: "such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 US at 574, n. 21.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. Moreover, there is no issue involving extraterritoriality that warrants holding this case pending disposition of *State Farm v. Campbell*.

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Respectfully submitted,

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